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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS (a corporation),

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and JOHN E. BRYSON, VERNON L. STURGEON, RICHARD D. GRAVELLE, CLAIRE T. DEDRICK, and LEONARD M. GRIMES, JR., the members of said Public Utilities Commission; THE PACIFIC GAS AND ELECTRIC COMPANY, a corporation,

Appellees.

On Appeal From the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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A large part of the population of California is dependent on PG&E for gas and electric service. The California Public Utilities Commission regulates PG&E without regard to attrition—the constant worsening, caused by inflation, of the ratio of earnings to plant investment—, thus driving the market price of common stock below book value. PG&E is required by law to expand to give service. Its sale of new stock below book value, continuous since 1973 and required by Commission action, confiscates the equity of stockholders in the Company.

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Appellant proved steady attrition, causing *any* allowed rate of return to decline. This proof was not rebutted or even questioned. The Commission ignored it. On appeal, the Supreme Court of California ignored it. The Commission cited the controlling cases, *Bluefield* (262 U.S. 679) and *FPC* v. *Hope* (320 U.S. 591) but ignored the application of those cases to an inflationary period. When the yardstick is changing because of inflation (conservatively calculated at 6 percent), it is contemptuous of constitutional rights to legislate utility rates on the basis of a fictitious yardstick, yet the Commission did exactly that and was sustained by the California Court.

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Appellant has standing to represent its members who are holders of PG&E common stock. The stockholders have standing; they suffer an injury wholly different and distinct from the injury suffered by the Company, because California law requires the Company to sell stock below book value using the stockholders' equity as bait to bring in new money.

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It is essential to the nation that gas and electric companies meet the needs of customers. Regulation which blindly ignores inflation is destroying the ability of PG&E and other utilities to raise funds to give service (which they are required by law to do) except to the extent that confiscation of stockholders' equity furnishes bait to attract new money. Confiscation violates the Constitution. Further, it is a device which has a short life. Sophisticated investors are leaving the market for PG&E common equity. The small investors are left to be confiscated.

Conclusion 21

This Court should save the situation by asserting jurisdiction and applying the teaching of *Bluefield* and *FPC* v. *Hope*. The Court need only remand the case to California with instructions to make due allowance for attrition.

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CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS (a corporation),

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and JOHN E. BRYSON, VERNON L. STURGEON, RICHARD D. GRAVELLE, CLAIRE T. DEDRICK, and LEONARD M. GRIMES, JR., the members of said Public Utilities Commission; THE PACIFIC GAS AND ELECTRIC COMPANY, a corporation,

Appellees.

On Appeal From the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

California Association of Utility Shareholders ("Appellant" or "Shareholders") appeals from an order of the Supreme Court of the State of California entered on July 19, 1979, upholding Decision No. 89316, dated September 6, 1978, and Decision No. 89654, dated November 9, 1978 (the "Commission Decisions"), of

the Public Utilities Commission of the State of California (the "Commission"). Notice of appeal was filed on October 9, 1979. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and should exercise its jurisdiction to determine the substantial federal question presented.

OPINIONS BELOW

The final judgment of the California Supreme Court (App. A), dated July 19, 1979, will not be reported. The judgment was entered without opinion, one justice dissenting from the Court's refusal to issue a writ of review. The Commission Decisions (App. B and App. C) are as yet unreported.

JURISDICTION

This appeal is brought to review a final judgment of the California Supreme Court upholding the Commission Decisions. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). The "statutes" whose validity is drawn in question are the Commission Decisions, which are statutes within the meaning of 28 U.S.C. § 1257(2): *Atchison, Topeka & Santa Fe Railway* v. *Public Utilities Commission of California,* 346 U.S. 346, 348 (1953); *Bluefield Water Works & Improvement Co.* v. *Public Service Commission of West Virginia,* 262 U.S. 679, 683 (1923); *Lake Erie & Western Railroad Co.* v. *Public Utilities Commission of Illinois,* 249 U.S. 422, 424 (1919).

The Supreme Court of California is the highest court of that state. The validity of the Commission Decisions was drawn in question in the California Supreme Court on the ground of their being repugnant

to the Constitution of the United States, and the decision of the California Supreme Court was in favor of their validity. Appellant asserted its rights under the Constitution of the United States in the Opening Brief (pp. 3 to 7), Reply Brief (p. 8), and Application for Rehearing and Reconsideration (e.g. p. 2, p. 25) filed with the Commission, and in its Petition for Writ of Review (pp. 4 to 7) and Memorandum of Points and Authorities (pages 11-14, 16-20, 22, 23-35) and Reply of Petitioner to Answer of Respondent (pp. 2-10, 21) filed with the California Supreme Court.

The judgment of the California Supreme Court is a final judicial decision on the merits of all issues including the federal questions raised in the state court review proceeding and before the Commission. *Napa Valley Electric Co.* v. *Railroad Commission of California,* 251 U.S. 366 (1920); *People* v. *Western Air Lines, Inc.,* 42 Cal. 2d 621, 630, 268 P. 2d 723, 728 (1954), *appeal dismissed,* 348 U.S. 859 (1954).

In the event that appeal is not considered the proper mode of review, Appellant requests that the papers on which the appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

QUESTION PRESENTED

Did the California Public Utilities Commission violate the Fourteenth Amendment by fixing rates of The Pacific Gas and Electric Company (the "Company") through the traditional method of establishing a relationship between rate base and earnings, but while ignoring the continuous inflation-caused deterioration which makes the declared relationship a fiction, so that shareholders of the Company, represented by Appel-

lant, have their property confiscated as the Company (acting under compulsion of California law to give service regardless of earnings) sells new stock below book value and deprives shareholders of their investment in the Company?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment: . . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . .

Section 451 of the Public Utilities Code of California:

> Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, . . . as are necessary to promote the safety, health, comfort. and convenience of its patrons, employees, and the public.

STATEMENT OF THE CASE

Background

The Company supplies electric and natural gas service throughout most of northern and central California, an area with a population of over 9,000,000 people. Its sales to retail customers are regulated by the Commission. Its total assets exceed $9 billion. Its total operating revenues are approximately $3.8 billion and its total operating expenses are approximately $3.3 billion.

Appellant is a California membership corporation which represents shareholders of all major California public untilities and specifically, in this case, shareholders of the Company who are members of Appellant.

The Company has repeatedly filed applications with the Commission for permission to increase the rates charged by the Company, and the Commission has repeatedly made decisions which have allowed the Company to increase rates and rate of return only in amounts far less than as requested by the Company, without taking account of the fact that continuous and progressive deterioration in earnings, brought about principally by inflation, meant that the Company did not in fact receive the rate relief ostensibly allowed by the Commission. The Company did not, under such orders, receive an opportunity to earn the rates of return found by the Commission to be fair and reasonable and essential to the financial integrity of the Company. As a consequence the market price of the stock fell below book value during the first half of 1973 and has remained continuously below book value since that time.

The Company is required by California law to make whatever investment is required to serve the needs of the population in its operating areas, and this obligation is not qualified or limited by the fact that the investments may not produce reasonable revenues, nor by the fact that the Company does not have the funds to make such investments and can obtain such funds only by sales of securities on increasingly disadvantageous terms, including sales of common stock at prices per share less than the investment per share of existing stockholders. It is not possible to sell bond issues repeatedly without sales of common stock, since the Company's "equity ratio" is low and debt obligations become increasingly lower in quality with higher interest rates to the extent of eventually becoming unsaleable, unless sales of stock are made, at what-

ever price is obtainable in the marketplace, to preserve a tolerable debt-equity ratio.

As a result of the decisions of the Commission prescribing rates, which in fact will not yield even the inadequate rates of return authorized by the Commission, the Company has repeatedly met its legal obligation to serve California customers by selling common stock at less than book value [1] (i.e. less than the net investment per share), specifically with the purpose and effect of transferring to the new stockholders a portion of the investment of existing stockholders. The Commission has, by its repeated decisions, knowingly and intentionally deprived stockholders in the Company of substantial portions of their investment in the Company.

Proceedings Below

The Commission Decisions in this case resulted from applications filed by the Company on May 5, 1977. After extensive hearings, the Commission entered its

[1] *Every* sale of new stock by the Company since 1973 has been at prices below book value. Since that date up to and including the most recent issue, over 36 million shares have been sold below book, at discounts as high as 42%. The total dilution imposed on existing shareholders by such sales exceeds $270 million (Exh. 64, pp. 28-30, Exh. 65, Table 6). Forced sales of stock below book value cause confiscation. For example, if A and B form an enterprise and each contributes $10 for one share, the book value is $10 per share. If the enterprise needs additional capital and A and B reluctantly bring in a third investor at $7 for one share, the company has $27 in capital with three shares outstanding, each with a book value of $9 per share. A and B have lost $1 per share of their original investment. This is the heart of the problem. California law compels utility shareholders to accept this confiscation.

Decision on September 6, 1978 and on November 9, 1978 denied Shareholders' Application for Rehearing and Reconsideration. The Commission allowed a rate of return of 12.83 percent on equity and 9.5 percent on rate base. Shareholders believe that the rates of return found by the Commission in this case are far too low and are confiscatory based on the evidence before it. We do not believe that it is necessary for the Court to determine what the appropriate rate of return is in this case. This appeal is based on different grounds. It is based upon the complete failure of the Commission to make allowance for the continuous and obvious deterioration experienced by the Company in the conventional rate-base-revenue-expense formula which the Commission relied on to establish the rate of return.

The Commission's failure means that the authorized rate of return *can not* be earned as expenses, such as labor and the costs of new plant, increase faster than revenues. If the principles of *Bluefield* [2] and its progeny are still viable, there must be specific allowance made for this progressive deterioration in the formula for fixing rates during the expected life of the rates, which in California is now a minimum of two (2) years.

The Shareholders' point is that when 12.83 percent is the rate which the Commission found to be fair and reasonable, the Commission did not in fact authorize 12.83 percent rate of return because it failed even to acknowledge uncontradicted evidence which showed that any authorized rate of return on common equity

[2] *Bluefield Water Works & Improvements Co.* v. *Public Service Commission of West Virginia*, 262 U.S. 679 (1923).

was deteriorating (i.e. suffering attrition) at the rate of 0.16 percent per month.[3]

The facts regarding attrition and dilution were presented to the Commission in hearings on January 19, 1978 by Ross Cadenasso, who was called as a witness by Appellant. The witness' prepared direct testimony (Exhibit No. 64) and accompanying tables and charts (Exhibit No. 65) were sworn to and received in evidence (transcript page 1123) and the witness was cross-examined (transcript pages 1123-1129). The witness demonstrated that return on common equity had declined from 1976 to 1978 at 0.16 percent per month. He pointed out that inflation during the period had been close to 6 percent annually; that most economists were estimating inflation rates of at least that magnitude for the next several years; that Chairman Arthur Burns estimated the inflation rate in 1978 between 6 percent and 6½ percent; that President Carter's "Budget Review" as of September 26, 1977 estimated inflation at 6.3 percent in 1978 and 5.7 percent in 1979; that some economists believe that we may see a recurrence of double digit inflation by 1980 (Exhibit No. 64, pages 38-39). The witness estimated that the attrition rate for the period October, 1978 through March, 1980, with new rates in effect, would be 0.16 percent per month, assuming 6 percent inflation (Exhibit No. 64, page 39).

Mr. Cadenasso explained that the attrition factor could be employed by determining the mid-point of the

[3] 12.83 percent was the rate of return authorized for PG&E in the last previous general rate case and the Commission knew that PG&E had never been able to earn that allowance and that the price of its stock never approached book value thereafter.

period during which the new rates could be expected to be in effect; that the appropriate multiple of 0.16 percent per month should be added to the allowed (or "targeted") rate of return so that at the mid-point of the period the Company would have an opportunity to earn at the targeted rate of return (Exhibit No. 64, pages 39-40). The witness pointed out that if there is no adequate allowance for attrition, there is no way that the Company can actually earn the return found to be fair and reasonable by the Commission, because attrition will immediately start to erode the actual return (Exhibit No. 64, p. 42).[4]

Witness Cadenasso testified that since 1973 the Company had sold common stock each year; that 36.7 million shares of stock were sold, raising about $745 million for the Company; and that these 36.7 million shares of stock were sold at an aggregate of $279 million below their book value; that the Company had to sell 10 million more shares of common stock than it would have had to sell if it could have obtained book value (Exhibit No. 64 pages 28-29).

The witness concluded that an attrition allowance of 1.44 percent should be added to the allowed rate of return on equity, this being equivalent to nine months at 0.16% per month so that during the first nine months of the expected life of the new rates the earnings would be above the targeted rate and during the second nine months the earnings would be below the targeted rate. He recommended an allowed rate of return on equity

[4] The decline in the actual rate of return has caused a reduction in the market price, which is what an investor will pay for common stock of a utility. Mr. Cadenasso demonstrated that the decline in market price below book value became more severe after 1973 when inflation began accelerating.

in the range of 13.5 percent to 14 percent; with the addition of the attrition allowance of 1.44 percent this would require rates sufficient to produce initially a going rate in the range of 14.9 percent to 15.4 percent, decaying month by month, assuming inflation of only 6 percent per annum, so that the targeted rate of 13.5 to 14 percent might be achieved at the mid-point after nine months, and decaying further during the second half of the period to 1.44 percent below the targeted range (Exhibit No. 64, pages 40-41) so that the anticipated range, nine months after the mid-point, would be from 12.06 percent to 12.56 percent which of course is actually below the Commission's authorized return of 12.83 percent.

The witness testified that the objective of his approach and other approaches to the problem of attrition is the same, that is to achieve a targeted rate of return in a future period during which inflationary forces will steadily reduce earned rate of return (Exhibit No. 64, page 37).[5]

It is evident from the witness' testimony that the allowance for attrition, which he carefully computed at 0.16 percent per month based on 6 percent inflation, is entirely independent of the rate of return on equity which is found to be fair and reasonable; that rate of return might simply be regarded as "x" percent. Witness Cadenasso's "target" range on equity was 13½ to 14 percent, which is his value of "x". The Commission's rate for "x" was 12.83 percent.

The Commission, by legislative act, fixes rates for the future. Conventionally, as in this case, it develops

[5] The essence of *Bluefield*, 262 U.S. 679 (1923), was that shareholders were not adequately compensated during inflationary periods.

figures for the test year for revenue and for expenses and for rate base. To the extent that the Commission uses information which does not take account of deterioration because of inflation, then the figures are fictitious and in effect a hoax.

Witness Cadenasso was cross-examined by counsel for the Staff and by counsel for the Federal Executive Agencies (transcript pages 1123-1129). Neither cross-examiner asked any questions about attrition or took the slightest notice of the witness' testimony on that subject.

The Commission's Decision (No. 89316, dated September 6, 1979) is 107 pages in length, plus Appendices, plus a Dissent by Commissioner Symons and a Concurrence in the dissent by Commissioner Sturgeon. In its Opinion, it took no notice of the attrition evidence except to state on page 17b that "the California Association of Utility Shareholders believes that to achieve actual average earnings of 13½ percent to 14 percent will require a test year rate of return on average common stock equity of between 15.4 percent and 15.9 percent." The Commission simply recorded this "belief". It did not state the grounds of this belief, it did not analyze it, it did not express any interest in the subject or indicate any view of its own.

The Commission discussed rate of return at pages 17b to 21b of Decision No. 89316 (App. B hereto). It can be summarized as follows:

> The parties testified to different rates of return; the United States Supreme Court has established guidelines for the determination of just and reasonable rates of return, in *Bluefield* and *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); these

cases established that for a rate of return to be reasonable it should be sufficient to compensate investors for risks undertaken, to attract capital and to maintain the utility's financial integrity; *Hope* shows that the interest of the investor must be balanced against that of the consumer. [Nowhere in the Decision does the Commission attempt to demonstrate how these guidelines should be applied.] The Commission may exercise discretion.

The cost of debt and preferred stock is fixed and non-judgmental and the rate on equity is a major determinant of just and reasonable rates; measures adopted by the Commission, identified by the acronyms SAM, ECAC, PGA and as Regulatory Lag Plan are designed to allow the Company to maintain a reasonably constant cash flow; these measures must be viewed in the context of recent increases in inflation and upward trends in interest rates; these measures impact risk downward; otherwise a higher return might be warranted; in the balance, weighed against rising debt costs, a reduction in allowed return on equity is not warranted.

If the Company had vigorously pursued cogeneration efforts, more aggressively undertaken its commercial and industrial energy audit program and undertaken exhaustive review of repowering existing generating units as an option to building new capacity, and more aggressively promoted conservation, the Commission would be inclined to authorize a higher return of equity.

Based on the foregoing, there is no need to increase the allowed rate of return. The Commission found (App. B, page 21b) that a reasonable return on estimated 1978 total common equity is 12.83 percent; this results in 9.5 percent rate of return on rate base; this requires additional electric revenue of $39,188,000 and an additional gas revenue of $99,329,000.

In summary, attrition was ignored. The Commission continued to ignore attrition in dealing with Shareholders' Application for Rehearing and Reconsideration of Decision No. 89316. In its Application, dated October 4, 1978, Shareholders pointed out that the Decision on rate of return was confiscatory and unlawful and that it violates the Constitution of the United States (page 2), and that the Decision is repugnant to the Constitution of the United States and in particular the Fourteenth Amendment because it deprives shareholders of their property without due process of law in that it establishes a confiscatory rate of return and grants no provision for protection of that or any other return against attrition (pp. 24-25).

Decision No. 89654 (App. C), filed November 9, 1978, simply denied rehearing of Decision No. 89316.

Shareholders' Petition for Writ of Review to the Supreme Court of the State of California, dated December 5, 1978, clearly raised the issue of confiscation in violation of the Fourteenth Amendment because the uncontradicted evidence showed that any rate of return could be expected to decline at the rate of 0.16 percent per month and that the Commission's prescription of a rate of return, without allowing for or even making any findings on the fact of attrition, is a hoax (pages 3-7).

In its Answer to Shareholders' Petition to the Supreme Court of California, the Commission simply ignored the evidence on the issue of attrition. The Commission misstated the contention by saying ". . . the Commission had a number of recommendations before it. Not surprisingly the highest was that of the Shareholders' witness who recommended a range of 15.40

percent to 15.90 percent as a fair and reasonable return on common stock equity". Thus the Commission managed to misstate the Shareholders' recommendation for rate of return by including the recommended beginning-of-the-period allowance for attrition (1.44%) as part of the return allowance. The 1.44 percent was an attrition allowance computed on the basis of 0.16 percent for the estimated period from the effective date of new rates until the middle of the period for which they would be in effect. This allowance would decay month by month so that during the second half of the period the expected rate of return would correspondingly be *below* the target rate of return.

The Supreme Court of California disposed of the Petition for Writ of Review simply with two sentences: "Petition for Writ of Review Denied. Mosk, J. is of the opinion that the Petition should be granted".

Thus no California agency or court has ever deigned to discuss the contention of Shareholders that its constitutional rights and those of its members are violated when provision is not made for the impact of continuous inflation on rate of return. The Commission discussed the fuel cost and sales volume mechanisms (PGA, ECAC and SAM) and the Regulatory Lag Plan; see p. 12, supra) but not the problem of the continuing rise in general costs including interest rates.

THE APPELLANT HAS STANDING

Holders of common stock of the Company have suffered and will suffer injury as a result of the act of the Commission in establishing rates based on fictitious data, i.e. data respecting the relationship of revenue

less expenses to investment, when that data does not take account of existing and continuous attrition. Allegations of injury to members is sufficient for a justiciable case. *Warth* v. *Seldin,* 422 U.S. 490, 511 (1975); *Sierra Club* v. *Morton,* 405 U.S. 727, 735-741 (1972).

The interest of the stockholders who are members of Appellant is a substantial, constitutionally-protected interest, separate from the interest of the Company. When the stockholder has an interest distinct from the interest of the corporation, the stockholder has standing. *American Power and Light Company* v. *SEC,* 325 U.S. 385 (1945); *Allegheny Corp.* v. *Breswick & Co.,* 353 U.S. 151, 160 (1957). In this case, the stockholders are substantially damaged because the decisions of the Commission compel the Company to raise capital by selling additional stock below book value, thus transferring equity of shareholders to new purchasers. This injury is separate and distinct from the injury to the corporation. The Company is of course injured when it is granted an inadequate return, but the injury to shareholders resulting from the inevitable consequent sale of stock below book value does not injure the Company in the sense in which it injures the shareholders. When the Company sells stock below book value, its total net worth increases. It is better off as a result of the sale, although it has injured its existing shareholders. The shareholders find their equity partially confiscated; it is the bait which is offered to new investors.

It is well established, under California law, that the Company must find the money to build additional plant to serve customers in its operating area and that this obligation is absolute and is not limited by failure of the Commission to allow adequate earnings. *Lukrawka*

v. *Spring Valley Water Co.*, 169 Cal. 318, 146 P. 640, PUR 1915 B 331 (1915); *California Water and Telephone Co.* v. *Public Utilities Commission of California*, 51 Cal. 2d 478, 334 P. 2d 887, 895-6, 27 PUR 3d 442 (1959); *Bevel* v. *Sterkin*, 66 Cal. PUC 286 (1966); *Lande* v. *Napa Ranch*, 30 Cal. RRC 704 (1927); Section 451 Cal. Pub. Util. Code. The general law is in accord: *Middlesex Water Co.* v. *Board of Public Utility Com'rs.*, 6 N.J. Misc. 51, 140 Atl. 254, 256 PUR 1928 C 343, 347 (N.J. Sup. Ct. 1928), where the court said (140 Atl. at p. 256):

> It is rather an alarming proposition that a company, enjoying a franchise to furnish water to a municipality, in the performance of which task it must be considered that the lives, needs, health, and comfort of the inhabitants, and safety of property are involved, because all, more or less, are dependent upon an adequate supply of water, with adequate service, can successfully entrench itself against a compliance with the order of the board on the plea that the company has not the financial ability to furnish equipment for an adequate supply of water with adequate service for distribution. Palpably such an excuse cannot properly be permitted to prevail.

The constitutionally-protected interest of the shareholders represented by Appellant is infringed by the decisions of the Commission in a way which is distinct from the injury to the Company, in that the Commission's decisions compel involuntary confiscation of the investment of the shareholders.

THE QUESTION IS SUBSTANTIAL

The Commission acknowledges and purports to accept the guidelines established by this Court: "The United States Supreme Court has established certain guidelines for ratemaking agencies in its determination of the just and reasonable rate of return to be allowed public utilities" (citing and paraphrasing *Bluefield* and *Hope;* Decision No. 89316, App. B, page 17b). The right to the protection afforded by those cases is not contested. Nevertheless, the Commission ignores the issue of attrition. In its 107 page opinion it mentions it only in the sense of a recital (page 17b) that appellant "believes that to achieve actual average earnings of 13.5 percent to 14 percent will require a test year rate of return on average common stock equity of between 15.4 percent and 15.9 percent." Its counsel, defending the Commission's Decision in the California Supreme Court, ignored attrition and misstated the evidence, stating that Appellant's witness recommended a range of 15.40 percent to 15.90 percent as a fair and reasonable return on common stock equity, thus grossly and inexcusably burying the contention regarding attrition.

It is understandably difficult for this Court to deal with complicated issues of fact in rate cases. This is not a case in which the Court is faced with that problem. In this case, the proper and reasonable rate of return may be taken as "x". The issue is simply whether the Commission must take account of attrition, that is, whether in a situation of obvious and continuous inflation it can refuse to take cognizance of inflation in applying its rate-making formula. How the Commission must deal with attrition is not the issue. The correct allowance for attrition is not the issue.

At this stage we must assume that the California Supreme Court, on remand from this Court, would issue to the Commission instructions to take account of attrition and make a *bona fide* determination of a proper allowance.

Most, although not all, of the electric and gas distributing utilities of the United States and *their stockholders,* are directly affected by the issues in this case. Salomon Brothers' "Electric Utility Common Stock Data" for September 4, 1979, shows that 100 leading electric utilities had an average common stock market to book ratio of 88%. The median was 86%. Only 12 of the largest 100 companies had a market to book ratio of 100% or better and after considering underwriting costs, *only six* could raise new common stock equity today without partial confiscation of existing shareholder's equity.

The Company's ratio was 81%. The Company is in the process of offering nine million shares of new common stock (expected offering date of October 23, 1979) and the best current estimate of sales price is not more than 75% of book value.

At the same time, the production and distribution of energy is a matter of the greatest importance to the people of the United States now and will be of greater importance in the future.

The electric and gas utilities are growing industries with a need to attract huge amounts of new capital. Capital expenditures in 1979 are projected at $24 billion of which some $14 billion must be raised outside of the companies (Standard and Poor's Industry Surveys, Utilities, Electric (March 22, 1979) p. U-24).

Utilizing the projected 12% to 15% annual growth rates through 1987 (*id.*, p. U-25) produces the almost inconceivable amounts for the single year 1987 of $59 billion if growth is at 12% and $73 billion if growth is at 15% annually!

These utilities have a covenant relationship with the state. They must serve the reasonable needs of the public and in return the state must not preclude, either directly or indirectly, their opportunity to earn the authorized and reasonable rates of return.

To emphasize the Catch-22 nature of the problem, the California Commission may and has reduced the authorized rate of return for utilities for failure to provide adequate service, *Pacific Tel. & Tel.,* 80 Cal. PUC 599, 16 PUR 4th 384, 393 (1976), and has delayed institution of rates which would produce authorized rates of return pending improvements of service, *Citizens Utilities Co. of California,* 53 Cal. PUC 264, 4 PUR 3rd 97 (1954).

Appellant believes that shareholders and consumers alike will suffer irreparable damage if this Court fails to take jurisdiction of this case. Recently a number of cases have been presented to this Court by utility companies. In each instance the Court has declined to take jurisdiction without describing its reasons. Appellant believes that the securities of utility companies will have impaired marketability if the Court fails to give shareholders the protection of *Bluefield* and *Hope* when the issue is squarely raised.

Appellant further believes that the interest of consumers, especially in this energy-short age, are inextricably bound up with those of shareholders to maintain the economic viability of utility companies. Utility

companies that are unable to attract capital will be unable to meet consumers' demands for services.

Would a prospective investor put his money into a utility company if the company were required to disclose that there is no practical means of enforcing his right to a fair rate, and every likelihood of confiscation of a substantial portion of his investment? Appellant believes that persistent failure to give support to *Bluefield* and *Hope* will inevitably lead to a requirement of such a disclosure.

The responsibility of utilities to meet service requirements is a substantial distinguishing feature when comparing investor choices. An ordinary business operation has no externally imposed obligation to raise capital for expansion. It need not enter the money marketplace during times of great inflation. The utility must, and yet the Commission ignored the effect of inflation on the Company and on the shareholders. These utilities must attempt to obtain funds from investors on the basis of the free will decision of the investor. It is a substantial question worthy of the consideration of this Court, whether the interest at stake can be injured by the legislative act of the California Commission without permitting the investor to invoke the protection of the United States Constitution.

According to data submitted by the Shareholders to the Supreme Court of California (Petition for Writ of Review, p. 2) there were 337,000 accounts owning common and/or first preferred stock of the Company as of December 31, 1976 and of this total, 305,000 accounts owned 500 shares or less, representing an investment of $12,000 or less at current market prices.

The sophisticated investor has abandoned the market for PG&E common stock to others. Current owners of stock have undoubtedly made their investments on the protection they thought *Bluefield* described, e.g. ". . . the utility is protected against being compelled to serve for confiscatory rates . . ." *Bluefield,* at 694. These people deserve protection but if the Court will no longer protect them, they should know it. If utilities must disclose to potential investors that there is no constitutional protection against confiscation, can they raise the billions of dollars which will be necessary to satisfy consumers' demands for service?

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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